Date: November 7, 1995

Case Nos.: 94-INA-00417 - 00422

In the Matter of:

BAY DRY WALL, INC.,
Employer

On Behalf of:

JESUS RODRIGUEZ, [94-INA-00417]

GERMAN VARGAS, [94-INA-00418]

JUAN M. ALVAREZ, [94-INA-00419]

RICARDO G. VARGAS, [94-INA-00420]

MANUEL GARCIA, [94-INA-00421]

ADRIAN B. VARGAS, [94-INA-00422]
Aliens

Before: RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien

will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On July 15, 1992, Bay Dry Wall, Inc. ("Employer") filed an application for labor certification to enable Jesus Rodriguez, German Vargas, Juan M. Alvarez, Ricardo G. Vargas, Manuel Garcia, and Adrian B. Vargas ("Aliens") to fill the position of "Dry-Wall Applicator" (AF 117-119). The job duties for the position are:

> Installs plasterboard or other wallboard to ceiling and interior walls of building, using handtools and portable power tools: Installs horizontal and vertical metal studs for attachment of wallboard on interior walls, using handtools. Cuts angle iron and channel iron to specified size, using hacksaw, and suspends angle iron grid and channel iron from ceiling, using wire. Scribes measurements on wallboard using straightedge and tape measure, and cuts wallboard to size, using hacksaw. Cuts out openings for electrical and other outlets, using hawk-bill knife and hammer. Nails wallboard to wall and ceiling supports using hammer. Trims rough edges from wall board to maintain even joints, using knife. Nails prefabricated metal pieces around windows and doors and between dissimilar materials to protect drywall edges.

The requirements for the position are drywall training and two years of experience in the job offered.

The CO issued a Notice of Findings on September 24, 1993 (AF 11-14), proposing to deny certification on the grounds that U.S. workers are able, willing, qualified, and available for the job opportunity and because the Employer has failed to comply with Federal Regulations governing the labor certification process for the permanent employment of aliens in the U.S. at Title 20 C.F.R. § 656. The CO stated that the regulations at 20 C.F.R. § 656.21(b)(5) require that the requirements for the job are the minimum necessary for the performance of the job and the Employer has neither hired nor finds it feasible to hire workers with less training and/or experience. However, the CO found that the Aliens did not possess two years of experience as a

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Dry-Wall Applicator at the time of their hire. Additionally, the CO stated that the regulations at 20 C.F.R. § 656.21(b)(3) require that the Employer document that other efforts to locate and employ a U.S. worker for the offered job have been, and continue to be, unsuccessful. The CO found that there was no evidence that the Employer's current employees were recruited or considered for this position; furthermore, the application contains no information as to the basis upon which the Alien was selected for this position over similarly situated company employees. Finally, the CO stated that the regulations at 20 C.F.R. § 656.21(b)(6) provide that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful, job-related reasons, and § 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker. The CO found that there are 21 U.S. workers qualified for the offered position who were rejected for other than lawful, job-related reasons. Additionally, the CO found that no recruitment results were provided for 11 U.S. applicants.

Accordingly, the Employer was notified that it had until October 29, 1993, to rebut the findings or to cure the defects noted.

In its rebuttal, dated October 28, 1993 (AF 8-10), the Employer contended that the Aliens did receive their two years of experience while working for the Employer as independent contractors and that it is not now feasible to hire a worker with less than the required qualifications due to business necessity. The Employer stated that the Aliens do the majority of the work that his company is engaged in - he has nine independent contractors, including the six Aliens. The Employer stated that, "[t]he total work force for Bay Dry Wall has remained unchanged since using the service of the aliens because there are no qualified U.S. workers in this community." The Employer also stated that he would have to close his business if he had to take the time and effort to train new employees to replace the Aliens. The Employer further contended that no company employees applied for the offered position, and that he has lawfully rejected all U.S. applicants for job-related reasons. In response to the NOF that the Employer did not provide recruitment results for 11 U.S. applicants, the Employer stated that these applicants did not apply at Bay-Dry Wall.

The CO issued a Second Notice of Findings on November 26, 1993 (AF 6-7), proposing to deny certification on the grounds that the Employer has failed to comply with Federal Regulations governing the labor certification process for the permanent employment of aliens in the U.S. at Title 20 C.F.R. § 656. The CO found that, based on a review of the case file and the rebuttal evidence, it appears that the sponsored Aliens are independent contractors and not employees of Bay Dry Wall, Inc., and that the Employer uses nine **independent contractors**; there is no evidence that there are any employees of the Employer.

Accordingly, the Employer was notified that it had until December 31, 1993, to rebut the findings or to cure the defects noted.

The Employer filed its rebuttal to the Second Notice of Findings on December 29, 1993 (AF 5), contending that the Employer is attempting to obtain labor certification for the Aliens in order to "convert their status from independent contractors to employees."

The CO issued the Final Determination on March 25, 1994 (AF 2-4), denying certification because the Employer has failed to comply with the Federal Regulations governing the labor certification process for the permanent employment of aliens in the U.S. at Title 20 C.F.R. § 656. Specifically, the CO found that the Employer has not provided the requested information to show that it is not presently feasible to hire individuals without two years of experience and train them as the Employer has done in the past, or why the Employer cannot hire individuals with two years of experience from a different employer. Additionally, the CO found that 18 U.S. applicants were qualified for the position and rejected for other than lawful, job-related reasons.

On April 22, 1994, the Employer requested review of the Denial of Labor Certification (AF 1). On May 16, 1994, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). The Employer filed a Brief on July 1, 1994.

Issues

The issues presented in these cases are whether the Employer listed the position at its actual minimum requirements, as it has provided the Aliens with the job experience and training to qualify for the position, and whether it has provided lawful, job-related reasons for the rejection of all U.S. applicants.

Discussion

Minimum Job Requirements:

Section 656.21(b)(5) addresses the situation of an employer requiring more stringent qualifications of a U.S. worker than it requires of the alien: the employer is not allowed to treat the alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a Bayside Motor Inn*, 89-INA-105 (Feb. 14, 1990). An employer violates § 656.21(b)(5) if it hired the alien with lower qualifications than it is now requiring and has not documented that it is now not feasible to hire a U.S. worker without that training or experience. *Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992); *Office-Plus, Inc.*, 90-INA-184 (Dec. 19, 1991); *Gerson Industries*, 90-INA-190 (Dec. 19, 1991); *Rosiello Dental Laboratory*, 88-INA-104 (Dec. 22, 1988); *MMMats, Inc.*, 87-INA-540 (Nov. 24, 1987).

Labor certification is properly denied under § 656.21(b)(5) where the alien does not possess all of the job requirements, thus evidencing that the job was not listed at its actual minimum requirements. *Valley Beth-Shalom School*, 91-INA-382 (Dec. 28, 1992). If the employer demonstrates that the alien qualifies for the position based solely on experience gained with another entity, but also has experience with the employer, the experience with the employer does not violate § 656.21(b)(5). *William Lawrence Camps, Inc.*, 90-INA-248 (June 24, 1991).

In this case, the Employer requires "drywall training" and two years of experience as a drywall applicator (AF 117). In its rebuttal, the Employer admits that the Aliens acquired their drywall application experience and training through the Employer, but asserts it is not feasible to train U.S. workers as it had trained the Aliens because there are no qualified U.S. workers in the

community, that his business "has increased dramatically since using the services" of the Aliens, his business "would have to close if he had to take the time and effort to train new employees to replace the Aliens," "U.S. workers would not be as dependable and reliable as the Aliens," and it would cause him "great financial difficulty" to train someone new (AF 5, 8-10).

Under § 656.21(b)(5), the Employer bears the burden of establishing why it is not now feasible to offer the same favorable treatment to U.S. applicants. An employer must sufficiently document a change in circumstances to demonstrate infeasibility. See *Rogue and Robelo Restaurant and Bar*, 88-INA-148 (Mar. 1, 1989) (*en banc*). The Employer's burden of establishing why it is not now feasible to offer the same favorable treatment to U.S. applicants has been characterized as heavy. *58th Street Restaurant Corp.*, 90-INA-58 (Feb. 21, 1991); *Fingers, Faces and Toes*, 90-INA-56 (Feb. 8, 1991).

Establishing infeasibility to train requires more than an assertion of growth in business or difficulty or inconvenience to the employer. *Montran Corp.*, 90-INA-300 (Jan. 8, 1992). See also, *Borrelli Bros., Inc.*, 93-INA-62 (Jan. 25, 1994); *Celini P.V.C.*, 92-INA-233 (May 28, 1993). Establishing infeasibility to train requires more than a mere showing of inefficiency. *La Barca Restaurant*, 91-INA-15 (June 8, 1992). A rare case where an employer has demonstrated the present infeasibility to train was in a situation where the employer showed that a change in its corporate ownership and a reduction in its workforce left the alien as the sole remaining employee with the knowledge and training required of an electronics engineer. *Avicom International*, 90-INA-284 (July 31, 1991).

Here, Employer has merely asserted that the business has "increased dramatically," but has provided no documentation of that increase (AF 9). Moreover, Employer's assertions that U.S. workers would be less dependable or reliable than the Aliens, and that the business would have to close if others had to be trained as the Aliens, are also without support (AF 9-10). This evidence is not sufficient to meet Employer's heavy burden. Assertions of difficulty or inconvenience by the Employer are not sufficient to establish infeasibility to train. See *Montran Corp., supra*. Like-wise, Employer's assertion of a growth in business does not establish the infeasibility to train a U.S. worker. See *Super Seal Manufacturing Co.*, 88-INA-417 (Apr. 12, 1989) (*en banc*); *AEP Industries*, 88-INA-415 (Apr. 4, 1989) (*en banc*). This evidence fails to meet the standards for a change in circumstances sufficient to establish infeasibility. See *Avicom International, supra.*

We find that the Employer has admitted that it has trained the Aliens, and failed to establish that it is infeasible to train U.S. workers as the Aliens were trained, and thus, the CO's denial of labor certification on the issue of actual minimum requirements must be affirmed.

Rejection of U.S. Workers:

Section 656.21(b)(7) provides that if U.S. workers have applied for the job opportunity, an employer must document that they were rejected solely for lawful, job-related reasons. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. workers. Therefore, an employer must take steps to ensure that it has rejected the U.S. applicants only for lawful, job-related reasons. Furthermore, although the regulations do not explicitly state

a "good faith" requirement in regard to post-filing recruitment, such a good-faith requirement is implicit. *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1. The burden of proof for obtaining labor certification lies with the employer. 20 C.F.R. § 656.2(b).

In this case, the local employment service submitted the names of 29 U.S. workers who all appeared to have the required two years of experience as a drywall applicator (AF 35). In a letter dated August 16, 1993, the Employer rejected 20 of those applicants for not having the required experience (AF 27-29). In rebuttal, the Employer stated that it did not receive any applications of U.S. workers other than those 20 individuals (AF 9).

Generally, an applicant is considered qualified for a job if s/he meets the minimum requirements specified for that job in the labor certification application. *United Parcel Service*, 90-INA-90 (Mar. 28, 1991); *Mancil-las International Ltd.*, 88-INA-321 (Feb. 7, 1990); *Microbilt Corp.*, 87-INA-635 (Jan. 12, 1988). An employer unlawfully rejects an applicant where the applicant meets the employer's stated minimum requirements, but fails to meet requirements not stated in the application or advertisement. *Jeffrey Sandler, M.D.*, 89-INA-316 (Feb. 11, 1991) (*en banc*); *Chromato Chemical*, 88-INA-8 (Jan. 12, 1989) (*en banc*). Here, the Employer offers no specific evidence to support its rejection of the 20 U.S. applicants other than they did not have "the exact experience required" (AF 9). All 20 of the U.S. applicants appear to be qualified on their applications, and although some may have overstated their qualifications, it is highly unlikely that all 20 would be falsifying their ability to apply drywall. Moreover, the Employer does not provide any documentation of its interviews or lawful rejection of these workers other than a short phrase next to their names stating that they did not have the required experience (AF 27-29).

We find that the Employer has failed to adequately document the lawful rejection of 20 U.S. applicants, and thus, the CO's denial of labor certification on the issue of unlawful rejection must also be affirmed.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of August, 2002, for the Panel:

Richard E. Huddleston
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party

petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decisions, or **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002.

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.